



POLICE DEPARTMENT

September 2, 2016

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In the Matter of the Disciplinary Proceedings :

- against - :

Police Officer Michael Falls :

Tax Registry No. 923810 :

Military and Extended Leave Desk :

FINAL

ORDER

OF

DISMISSAL
-----X

Police Officer Michael Falls, Tax Registry No. 923810, Shield No. 4557, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 2015-13521, as set forth on form P.D. 468-121, dated April 24, 2015, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Michael Falls from the Police Service of the City of New York.


JAMES P. O'NEILL
POLICE COMMISSIONER

EFFECTIVE: On October 19, 2016 at 0001 hours



POLICE DEPARTMENT
NEW YORK, N.Y. 10038
DEPUTY COMMISSIONER-TRIALS

-----X
In the Matter of the Charges and Specifications

: Case No. 2015-13521

- against -

Police Officer Michael Falls

Tax Registry No. 923810

Military and Extended Leave Desk

-----X
At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPEARANCE:

For the Department:

Samuel Yee, Esq.
Assistant Department Advocate
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent:

John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE WILLIAM J. BRATTON
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

Charges and Specifications:

1. Said Police Officer Michael Falls, assigned to Transit Bureau District 1, on or about and between September 15, 2014 and April 15, 2015, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer Falls did wrongfully ingest Cocaine without police necessity or authority to do so.
P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS
2. Said Police Officer Michael Falls, assigned to Transit Bureau District 1, on or about and between September 15, 2014 and April 15, 2015, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer Falls did wrongfully possess Cocaine, without police necessity or authority to do so.
P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on December 7, 2015, March 23, 2016, May 25, 2016, and June 22, 2016. Respondent, through his counsel, entered pleas of Not Guilty to the subject charges. The Department called Police Officer Sandro Scacchi and Dr. Thomas Cairns as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty as charged.

FINDINGS AND ANALYSIS

Police Officer Sandro Scacchi, who is assigned to the Medical Division's Drug Screening Unit (DSU), testified that on April 15, 2015 he was on duty at DSU assigned to collect hair and urine samples from members of the service who had been ordered to report to DSU that day for random drug screening. Scacchi testified that when he was first assigned to DSU he received two weeks of observation training from the Department and he was certified regarding how to properly collect and seal hair and urine samples for drug testing after completed online courses

offered by Psychemedics Corporation (Psychemedics), the drug testing laboratory the Department utilizes for hair sample testing, and Quest Corporation.

Scacchi recalled Respondent appeared at DSU on April 15, 2015 because his name was on the computer-generated list of members who had been ordered to report to the Medical Division for random drug screening. Scacchi testified that he collected hair samples from the Respondent by following DSU's mandated hair sample collection procedures. First, he assigned Respondent a drug screening number, which was number 07-1513-15-XH. The letter "H" in this drug screening number indicated that hair samples would be collected from Respondent. This drug screening number was entered on a "Drug Screening Questionnaire-Hair Testing" form [Department's Exhibit (DX) 1]. Respondent entered his name, shield number, and tax number on this form. Section 1 of this form required the Respondent to [REDACTED]

Respondent then signed and dated the form and Scacchi signed it as the "collector." The Respondent's index finger was inked and his fingerprint was entered on this form.

Respondent's drug screening number was also entered on three "Forensic Drug Testing Custody and Control" forms. These three identical forms each contained a different pre-printed "Specimen ID" number. The Respondent signed and dated each of the forms and Scacchi signed both forms as the "collector." The two "Forensic Drug Testing Custody and Control" forms that were to accompany the two hair samples that would be mailed from DSU to Psychemedics bore Specimen ID numbers T874741 (DX 2) and T874742 (DX 3). These two "Forensic Drug Testing Custody and Control" forms also contain different pre-printed Laboratory Accession Numbers (LAN). Specimen ID number T874741 contained LAN 119499335 (DX 2) and Specimen ID number T874742 contained LAN 410027905 (DX 3).

Scacchi followed mandated DSU hair sample collection procedures by bringing the Respondent into a room which contained two tables. Scacchi cleaned the whole sample collection table by spraying it with alcohol and wiping it down. He then put clean medical white paper on top of the table. He set-up on the table three strips of tin foil and three collection envelopes and three sample labels all of which he removed from a standard kit provided by Psychemedics. Scacchi took out and put on new gloves and removed a new razor from a container.

Scacchi testified that he asked Respondent to lift his leg up on top of the table and pull up his pants so that his bare leg was on top of the white paper. Scacchi then used the new razor to shave hair off of Respondent's leg onto the paper. Scacchi then lumped the hair into a single pile. Scacchi then separated the shaved hair into three equal piles. Each pile was placed into one of the three packets of tin foil and each packet of tin foil was folded and then placed into one of three sample collection envelopes which were each sealed along with a Sample Acquisition Card (SAC). Scacchi signed each SAC and the seal on each sample collection envelope in the Respondent's presence and he then had the Respondent initial each SAC and initial the seal on each sample collection envelope.

Scacchi then placed the three samples into a metal locker by dropping them through a slot in the locked cabinet in the Respondent's presence. The two hair sample SACs that bore Specimen ID numbers T874741 and T874742 (DX 4 and 5) were later mailed to Psychemedics for testing. The third sample was retained inside the locker for the Respondent's use.

Scacchi testified that on the Forensic Drug Testing Custody and Control form containing ID number T874741 (DX 2), Scacchi checked the box on the form that is next to the number "711" to indicate to Psychemedics that this was the first sample taken, which is also referred to

as Sample A. On the Forensic Drug Testing Custody and Control form containing ID number T874742 (DX 3), Scacchi wrote "B-Sample." On the Forensic Drug Testing Custody and Control form regarding the third sample that is retained inside the locker for the Respondent's later use, which bore ID number T874740, Scacchi wrote "C-Sample." Scacchi testified that only DSU personnel have access to the locked metal cabinet where hair samples are stored.

Scacchi testified that he has taken online refresher courses offered by Psychemedics and during the past year he attended a live presentation conducted by an instructor from Psychemedics. He estimated that each day he collects hair samples from about seven to nine members of the service (MOS) each day. If a MOS appears at DSU to be tested but the MOS does not have a valid ID, the MOS is not tested. Scacchi testified that he does not know if the waiting room, or the walls or the floors inside the testing room at DSU have ever been sanitized. Scacchi testified that the razor that he used was provided by Psychemedics and that he is required to obtain hair samples from head hair, unless he is not able to do this because an MOS' hair is less than one half inch in length, and that this was the case with Respondent.

Scacchi testified that he had no recollection of the paper on table ripping and that if this had happened he would have thrown out the ripped paper and replaced it with new paper. He confirmed that neither he nor Respondent washed his leg inside the testing room. He collects 150 milligrams of hair. He does not use a scale to insure that he has collected exactly 150 milligrams of hair.

Dr. Thomas Cairns, who is presently Senior Scientific Advisor and Deputy Lab Director and Sample Custodian, for Psychemedics, a drug testing laboratory in Culver City, California, was stipulated to be an expert in the area of testing hair for drug content based on the qualifications cited in his curriculum vitae (DX 6).

Cairns testified that he personally prepared the laboratory data package produced by Psychemedics which details the analytical results of the testing of the Respondent's hair samples (DX 7). Cairns confirmed that the laboratory data package shows that the chain of custody of the Respondent's hair samples was intact with no deficiencies. Cairns also confirmed that the laboratory data package shows that all quality control and quality assurance procedures were followed during testing.

Cairns interpreted the testing data contained in the laboratory data package. He testified that the analytical results show that Respondent's hair sample that was assigned LAN 119499335 was tested first and it tested presumptive positive for cocaine when subjected to the Enzyme Immuno Assay (EIA) screening test. As a result, following laboratory protocol, both of the Respondent's hair samples were then separately tested via Liquid Chromatography Mass Spectrometry (LC/MS/MS) instrumentation. The LC/MS/MS test results (DX 7 p. 3) showed that both samples tested positive for cocaine at a concentration level three times above the administrative reporting cut-off level of five nanograms of cocaine per ten milligrams of hair. The hair sample that was assigned LAN 119499335 tested positive at 16 nanograms of cocaine per ten milligrams of hair. The hair sample that was assigned LAN 410027905 tested positive at 17.1 nanograms of cocaine per ten milligrams of hair.

Cairns further testified that the LC/MS/MS analytical results show that both of the Respondent's hair samples also tested positive for the presence of benzoylecgonine (BE), the primary cocaine metabolite that is produced in the body when cocaine is ingested and metabolized. The hair sample that was assigned LAN 119499335 tested positive for BE at 0.9 nanograms per ten milligrams of hair, and the hair sample that was assigned LAN 410027905 also tested positive for BE at 0.9 nanograms per ten milligrams of hair. (DX 7 p. 3).

Cairns explained that when cocaine enters the body through ingestion, whether it is smoked, snorted, eaten or injected, it enters the blood stream and that as blood enters the liver, the liver metabolizes some of the ingested cocaine creating BE. As this blood then flows into the base of every hair follicle on the body, both cocaine and BE are trapped inside the hair follicles as they grow out from the skin.

Cairns testified that since the hair that was shaved from Respondent's leg was about one-and-one-half inches long, the Respondent's hair samples had about a "look back" period of six to seven months, meaning that analysis of the Respondent's hair samples would detect cocaine that was ingested within six to seven months of the date that the hair samples were collected. Cairns further testified that since it can take four to seven days for hair that is growing on a man's leg to grow long enough to be able to be cut off at skin level, Respondent's hair samples would not reflect any cocaine that he ingested up to seven days immediately prior to the date that his hair samples were collected.

Cairns opined that the LC/MS/MS analytical results reflected multiple ingestions of cocaine by Respondent and "that the levels in this case would point to recreational use, meaning ingestion almost every weekend during the six to seven months" preceding the date Respondent's leg hair samples were collected (Tr. p. 132).

Cairns confirmed that he did not personally perform any of the tests on Respondent's hair samples and that as many as 25 or more technicians employed by Psychemedics could have been involved in movement of Respondent's samples around the laboratory and the performance of these tests. Cairns conceded that there is a human element to the testing process, but that to prevent the possibility of human error Psychemedics has established "checks and balances" within the testing process, such as the barcode which is stamped on a sample upon receipt and is

scanned at each and every performance step to computer document the chain-of-custody of a sample and the progress of a sample through the testing system.

Cairns confirmed that dermal absorption of cocaine can occur when a person's skin comes into contact with cocaine but he opined that because dermal absorption is "a minor route of entry into the body," only a "very, very trace level" of cocaine would be detected by hair sample testing. Cairns also confirmed that if a person is in the vicinity of people smoking crack cocaine, the person could ingest cocaine inadvertently through inhalation, but he opined that the level of cocaine that would be detected by hair sample testing might be .1 compared to the administrative cutoff level of 5.0.

Respondent testified that he has never knowingly possessed or ingested cocaine. At his official Department interview on April 23, 2015, Respondent stated that he had no explanation for how his hair samples could have tested positive for the presence of cocaine. Respondent's testimony as to how his hair samples could have tested positive for the presence of cocaine will be discussed in the Analysis section of this decision.

Analysis

Scacchi's testimony established that Respondent's hair samples were properly collected and stored in accordance with Department-mandated hair sample collection and storage procedures and Cairns' testimony established that the seals on the samples and the chain of custody of Respondent's hair samples were intact with no deficiencies.

Cairns testified that after Respondent's first hair sample tested positive for cocaine via the EIA screening test, both of Respondent's hair samples were subjected to LC/MS/MS testing and the results (DX 7 p. 3) established that both of Respondent's hair samples tested positive for the presence cocaine at concentration levels which were three times over the administrative

reporting cut-off level. Cairns offered unrefuted expert testimony that these results reflected multiple ingestions of cocaine by Respondent during the six to seven month period preceding Scacchi's collection of his leg hair samples (Tr. p. 121, 126-127), and that if Respondent was ingesting standard "street cocaine" during that period of time, the concentration levels of cocaine detected in his hair samples reflected "recreation" use of cocaine of "one ingestion per weekend." (Tr. p. 174)

Although Cairns personally prepared Psychemedics' laboratory data package detailing the testing of the Respondent's hair samples (DX 7), Cairns did not personally perform any of these tests. However, due process does not require that the technicians who performed these tests testify at the disciplinary hearing and testing results may be admitted and credited based on the testimony of a laboratory supervisor where, as here, the reliability of the testing procedures used has been established, the supervisor is familiar with all the steps taken and is subjected to cross-examination, and no claim is raised that there was a specific defect in the testing procedures.¹ Respondent did not assert that there was a specific defect in a procedure utilized by Psychemedics to test Respondent's hair samples.

Where, as here, a positive result produced by a recognized screening test is confirmed when hair samples are subjected to mass spectrometry analysis, such testing results have been found to constitute substantial scientific evidence of the presence of cocaine in the sample.² Therefore, based on the above-cited testimony, Psychemedics' test results regarding

¹ Gordon v. Brown, 84 N.Y.2d 574, 579-580 (1994).

² McBride v. Kelly, 215 A.D.2d 161 (1st Dep't 1995).

Respondent's hair samples constitute substantial evidence that Respondent knowingly possessed and ingested cocaine.³

Respondent's affirmative defense of involuntary and unknowing ingestion

Respondent raised an affirmative defense of involuntary ingestion by contending that his positive test results must have been the result of accidental ingestion of cocaine caused by exposure to cocaine while he was performing his duties as a police officer. The only evidence Respondent offered to attempt to meet his burden of persuasion regarding the affirmative defense of involuntary ingestion⁴ was his own testimony.

Respondent asserted that at the point when Scacchi shaved the hair off of his leg, the paper that Scacchi had placed on table had ripped exposing Respondent's leg to the bare table top. Scacchi credibly testified that if the paper had ripped he would have replaced the paper. However, even if I credited Respondent's claim that at the time his hair samples were collected his leg was exposed to an uncovered table, that fact, standing alone, would not establish that Respondent's leg hair could have been contaminated by cocaine residue on the table. Not only did Scacchi credibly testify that he had decontaminated the table top by wiping it down with alcohol, Cairns testified that prior to being subjected to LC/MS/MS analysis both of Respondent's hair samples were washed "extensively using a using an aggressive three-and-one-half wash procedure" (Tr. p. 120-125) which removed any external contamination on the hair samples (Tr. p. 131-135).

Moreover, Cairns' testimony that both of Respondent's hair samples also tested positive "in excess of five percent" for the presence of BE, the primary metabolite of cocaine that is only

³ McGovern v. Safir, 266 A.D.2d 107 (1st Dep't 1999).

⁴ Green v. Sielaff, 198 A.D. 2d 113 (1st Dep't 1993).

produced when cocaine has been ingested (Tr. p. 129-130, 131-132, and 159), establishes that the cocaine-positive results were not the result of any non-ingestion, external contamination of his leg hair.

During his testimony at this trial, Respondent also asserted that his positive test results could have been the result of inadvertent ingestion of airborne cocaine while he was on duty. Respondent asserted that the unventilated evidence room at Transit District 1 contained seized cocaine and that the holding cells there had crack stems in the ceiling. Respondent also cited several on duty incidents as a possible cause of his hair samples testing positive for the presence of cocaine. He asserted that when he and another officer removed a homeless person, who looked like he was a crack smoker, from an elevator inside the Times Square subway station, the other officer told him that the elevator "smells bad." However, Respondent acknowledged that he had only surmised that the bad smell was airborne cocaine.

He also asserted that on November 24, 2014, when he was working at the desk, an officer, who is now retired, came to the desk and stated he had just been exposed to airborne cocaine which was on property he had removed from an arrestee and that he needed an exposure number.⁵ However, Respondent acknowledged that he never found out if the substance actually tested positive as being cocaine.

Respondent finally acknowledged that he could not cite any particular incident when he knew that he had definitely been exposed to cocaine, that he never reported any of the incidents he testified to at this trial, and that he never attempted to obtain an exposure number regarding any of these incidents. Moreover, Cairns offered unrefuted expert testimony that although

⁵ Members who believe they have been exposed to chemical substances are required to notify the desk officer who is required to notify the Medical Division Sick Desk and obtain an exposure report number for the member pursuant to Patrol Guide Procedure No. 205-10.

dermal absorption of cocaine can occur when a person's skin comes into contact with cocaine, because dermal absorption is "a minor route of entry into the body," only a "very, very trace level" of cocaine would be detected by hair sample testing. Cairns also offered unrefuted expert testimony that even if a person ingested cocaine inadvertently through inhalation by being in the vicinity of people smoking crack cocaine, the level of cocaine that would be detected by hair sample testing might be .1, compared to the administrative cutoff level of 5.0.

I credit the expert testimony of Cairns that a one-time incidental ingestion would produce a result "far below the cut-off" level (Tr. p. 126-127), that such an incidental ingestion could not have produced the cocaine levels detected in Respondent's hair samples,⁶ and that the testing results regarding Respondent's hair samples are only consistent with multiple ingestions of cocaine by the Respondent during the six to seven month period preceding the week that his hair samples were collected.

Finally, Respondent's assertion at this trial that his positive test results must have been the result of unknowing ingestion of cocaine due to exposure to cocaine while he was on duty must also be questioned in light of the fact that at his official Department interview on April 23, 2015, Respondent stated that he had no explanation as to why his hair samples had tested positive for the presence of cocaine.

As a result of the above analysis, I find that the Respondent did not meet his burden of persuasion regarding his affirmative defense of involuntary ingestion.

Since the record is devoid of any plausible alternative reason as to how the Respondent's hair samples could have tested positive for the presence of cocaine and BE at the levels detected by Psychometrics' testing other than that the Respondent obtained and knowingly ingested

⁶ See Chiofalo v. Kelly, 70 A.D. 3d 423 (1st Dep't 2010); Conner v. NYPD, 22 A.D. 3d 425 (1st Dep't 2005).

cocaine, the only conclusion that can be reached is that the Respondent possessed and ingested cocaine.

Although it is charged Respondent possessed and ingested cocaine between September 15, 2014 and April 15, 2015 (which was the day that Respondent's hair samples were collected by Scacchi), since Cairns testified that since it can take five to seven days for leg hair follicles to grow hair long enough for it to be shaved off at skin level, Respondent's hair samples would not reflect any cocaine that he ingested up to seven days immediately preceding April 15, 2015.

Therefore, consistent with Cairns' expert testimony, Respondent is found guilty of having ingested cocaine between September 15, 2014 and April 8, 2015.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 7, 1999. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

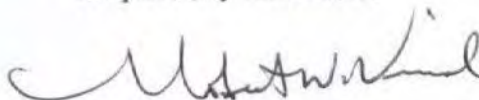
Respondent submitted a post-trial letter in which he discusses his career as a member of the Department and in which he argues that "(t)here is nothing about my entire career with the NYPD that points to any sort of substance abuse..."

However, the record here establishes that Respondent violated the Department's strict rule against using illegal drugs. Moreover, since I credit Cairns' expert testimony that the levels of cocaine discovered in Respondent's hair samples reflect multiple uses of cocaine during the six to seven month period preceding the date his hair samples were collected, Respondent was using cocaine during a period when he was performing full duty as a police officer assigned to Transit Bureau District 1. Thus, Respondent's cocaine use potentially put himself and the

Department at risk, an action which raises serious questions about Respondent's judgment and fitness to serve as a police officer.

As a result, I recommend that he be DISMISSED from the New York City Police Department.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPROVED

OCT 19 2016



JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MICHAEL FALLS
TAX REGISTRY NO. 923810
DISCIPLINARY CASE NO. 2015-13521

Respondent received an overall rating of 4.0 on his 2014 evaluation, 4.0 on his 2013 evaluation, and 3.5 on his 2012 evaluation. He has been awarded one Meritorious Police Duty medal and two Excellent Police Duty medals. [REDACTED]

[REDACTED] He has no prior formal disciplinary record. He has no monitoring records other than his suspension regarding the instant charges.

For your consideration.

Robert W. Vinal
Assistant Deputy Commissioner – Trials